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IN THE

Supreme Court of the United States

JACOB WINKELMAN, A MINOR, BY AND THROUGH HIS PARENTS AND LEGAL GUARDIANS, JEFF AND SANDEE WINKELMAN, *et al.*,

Petitioners,

v.

PARMA CITY SCHOOL DISTRICT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE* COUNCIL OF PARENT ATTORNEYS AND ADVOCATES INC., THE ARC OF THE UNITED STATES, TASH, NATIONAL DOWN SYNDROME CONGRESS, PUBLIC COUNSEL, THE ROCKY MOUNTAIN CHILDREN'S LAW CENTER, THE SUPPORT CENTER FOR CHILD ADVOCATES, CHILDREN'S LAW CENTER OF MINNESOTA, THE NORTHWESTERN UNIVERSITY SCHOOL OF LAW'S BLUHM LEGAL CLINIC, THE CHILDREN'S LAW CENTER OF MASSACHUSETTS, AND OKLAHOMA LAWYERS FOR CHILDREN IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

The *Council of Parent Attorneys and Advocates Inc.* (COPAA) is a not-for-profit organization for parents of children with disabilities, their attorneys and advocates. COPAA believes the key to effective educational programs for children with disabilities lies in collaboration between parents and educators as equal parties. To this end, COPAA does not undertake individual representation for children with disabilities but provides training and resources for advocates and attorneys to help each child obtain the free appropriate public education guaranteed by the Individuals with Disabilities Education Act (IDEA).[1]

The Arc of the United States (The Arc) is the oldest and largest national organization for people with intellectual disabilities (mental retardation) and related developmental disabilities and their families. It was founded in 1950 by parents and other concerned individuals, primarily to procure services for children with disabilities who were denied a public school education. Today, The Arc works to ensure that the estimated 7.2 million Americans with intellectual disabilities and related developmental disabilities have the services they need, including approximately 750,000 students with intellectual disabilities who are entitled to FAPE, in order to grow, develop and live in communities across the nation.

TASH is an international membership organization of people with disabilities, their family members, other

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1. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court in accordance with Supreme Court Rule 37.3(a). No counsel for either party has authored this brief, in whole or in part, and no person or entity other than Amici Curiae, its members or counsel, has made a monetary contribution to the preparation or submission of this brief.

advocates and people who work in the disability field. TASH has chapters throughout the United States and members from thirty-eight countries worldwide.

National Down Syndrome Congress (NDSC) is a membership-based organization, founded in 1972, of family members, friends, self-advocates and professionals pursuing equal rights and opportunities for persons with Down Syndrome. NDSC provides information, advocacy, support and encouragement throughout the country and internationally. NDSC works with its members on education issues, including working with parents to have their children included in regular education classes with age appropriate peers, and on other IDEA-related issues.

Public Counsel is the nation's largest public interest pro bono law firm. Established in 1970, Public Counsel is dedicated to advancing equal justice under law by delivering free legal services to indigent and underrepresented children and families throughout Los Angeles County, ensuring that other community-based organizations serving this population have legal support, and by mobilizing pro bono resources. Limited resources prevent Public Counsel from providing direct legal representation to all families challenging inadequate special education services. In the majority of cases, Public Counsel provides parents training and resources to assist them in advocating for their children on their own.

The Rocky Mountain Children's Law Center is a Colorado-based nonprofit that saves the lives of abused and neglected children through zealous legal representation, mentoring, therapy, education and legislative reform. It works to ensure that child clients are safe and receive individualized, sensitive care from a legal advocate.

The Support Center for Child Advocates (Child Advocates) provides legal assistance and social service advocacy to abused and neglected children in Philadelphia, including hundreds of children with disabilities. Child Advocates witnesses a range of systemic problems affecting children served by public agencies and school systems and promotes collaborative, multi-disciplinary casework and solutions to recurrent problems.

Children's Law Center of Minnesota (CLC), a nonprofit organization, opened in 1995 and is the only legal center for children in Minnesota. CLC's mission is to promote the rights and interests of all children—especially children of color and children with disabilities—in the judicial, child welfare, health care and education systems. CLC provides direct representation to children and participates in statewide efforts to reform and improve child welfare, juvenile justice and education systems.

The Northwestern University School of Law's Bluhm Legal Clinic has represented poor children in juvenile and criminal proceedings since 1969. The Children and Family Justice Center (CFJC) was established in 1992 at the Clinic as a legal service provider for children, youth and families and as a research and policy center. CFJC represents children in juvenile delinquency, criminal justice, special education, school suspension and expulsion, immigration and political asylum cases, and appeals.

The Children's Law Center Of Massachusetts (CLCM), founded in 1977, is a private, non-profit, legal advocacy and resource center providing direct representation to low income children in Eastern Massachusetts, and technical assistance and training to lay and professional communities in New England on issues affecting children's education, civil rights, custody, health and welfare. CLCM provides direct services to children from diverse racial and ethnic backgrounds.

Oklahoma Lawyers for Children (OLFC) works to protect children and promote their health and well-being by providing them the full benefit of legal counsel and other services. OLFC's purpose is to use the time, talent and resources of qualified pro bono lawyers and others to represent children in court.

Amici have a common interest in this case: concern over the abridgment of rights granted to parents under the IDEA to appear *pro se* in IDEA cases in court proceedings. Preventing parents from proceeding *pro se* obviates the guarantees of the IDEA. The inability of many parents to retain counsel in IDEA court proceedings effectively prevents both parents and children from obtaining the rights guaranteed to them under the IDEA.

SUMMARY OF ARGUMENT

Amici bring to this Court the unique perspective of parents of children with disabilities in legal disputes with public schools about their children's education, the children themselves and advocates for these children. Amici know the challenges faced by children with disabilities whose educational success depends on the right to secure a free appropriate public education (FAPE) promised by the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1400 et seq. (West 2000 & Supp. 2006). Amici have first-hand, practical insights to share with this Court as to how denying parents the right to appear *pro se* has a negative impact on children with disabilities.

Denying parents of children with disabilities access to courts unless they can find and/or afford a lawyer effectively obviates the rights, promises and protections of the IDEA and subverts the statute's purposes. Plainly, the IDEA is not designed or intended to limit access to justice to only those

fortunate enough to afford it. Nor was the IDEA ever intended to deny children with disabilities the right to FAPE—the fundamental guarantee embodied in the IDEA—because of the shortage of qualified lawyers willing and able to accept unprofitable IDEA cases. Access to justice must come at the moments when a child needs it most during his or her educational years or it has no meaning. It cannot wait until the child reaches the age of majority after losing years of developmental progress, thus mooting the capacity to mitigate educational deficiencies and eliminating a child's chances for educational success. By the time the law allows a child to appear on his or her own behalf at age eighteen, significant educational potential has been lost, often irreversibly.

Denying parents the right to appear *pro se* in federal court to protect the substantive rights guaranteed to them and to their children in the IDEA is inconsistent with the most careful and faithful accounting of the IDEA's principles as articulated by the First Circuit in *Maroni v. Pemi-Baker Regional School District*, 346 F.3d 247 (1st Cir. 2003). Amici agree with the briefs of Petitioners and the Solicitor General and Department of Education, which establish that the plain language of the IDEA makes parents of children with disabilities aggrieved parties in IDEA decisions affecting their children. This plain language is fully corroborated by legislative intent and supported by the sound public policy underpinning the IDEA. This policy is consistent with the experience of Amici—that parents of children become parties aggrieved when their own children are aggrieved. These words, "parties aggrieved," have more than just a technical, legal meaning. The aggrievement is real and meaningful to Amici and the families they represent across the nation.

Upholding the Sixth Circuit's decision would make a child's age or his or her parents' financial status the touchstones for accessing the court system to protect the child's right to FAPE. Such a decision would produce disastrous and unintended consequences including, most fundamentally, a potentially absolute barrier to entry to the federal court system for poor children, the tenuous prosecution of parents for the unauthorized practice of law and the promotion of administrative hearing officers to final arbiters of IDEA disputes without court review. These unintended consequences are neither statutorily authorized nor Congressionally intended and should be avoided.

ARGUMENT

I. Parents Possess All Rights Granted Under IDEA and Can Pursue Them *Pro Se*.

Children with disabilities and their parents work in a collaborative manner with schools to secure the special education services the children need. To effectuate the words, spirit and purpose of the IDEA, this Court has recognized that parental involvement is integral to the protection of a child's rights under the IDEA. *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 208 (1982). The unique bond between child and parent clearly results in the parent sharing many of the child's experiences, including educational ones. The IDEA's statutory structure recognizes this relationship by making parents an integral member of the educational team at all stages of the child's education. When disputes arise about the child's education during this collaborative process, parents are entitled to advocate under the IDEA by filing an action in federal court against any inappropriate decision which threatens access to FAPE. *Honig v. Doe*, 484 U.S. 305, 311-12 (1988). Nothing in the IDEA suggests that this parental involvement, integral to the protection of the child's rights, should stop at the courthouse door if he or she cannot afford to enter.

The text and purposes of the IDEA demonstrate Congress's intention to bestow IDEA rights on both parents and children. The briefs of Petitioners and of the Solicitor General in support of the petition for certiorari establish that the clear statutory language of the IDEA confirms that parents possess all procedural and substantive rights granted under the IDEA. Because they possess such rights, they are entitled under the IDEA and 28 U.S.C.A. § 1654 (West 2006) to proceed *pro se* on their own behalf to enforce their own rights.[2]

Consistent with the practice of parents and school districts in special education meetings and administrative hearings, the overall statutory scheme of the IDEA is replete with references to the role and rights of parents. Indeed, there is no essential point in the statutory scheme that leaves parents out. In its findings, Congress acknowledged the economic and other hardships parents have experienced in order to obtain an appropriate education for their children with disabilities. 20 U.S.C.A. § 1400(c)(2), (3), (5). In the statement of purposes, Congress noted that the statute ensures the protection of both "the rights of children with disabilities and parents of such children." *Id.* § 1400(d)(1)(B). Congress included definitions of "parent," "parent organization," and "parent training and information center." *Id.* §§ 1401 (23),

2. The rights of parents and children in the IDEA are co-extensive. The IDEA's statutory structure establishes that a parent is a party authorized to act for the benefit of his or her child, thus allowing the parent to also sue in his or her own name. Fed. R. Civ. P. 17(a) (providing that "a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought.") The IDEA treats parents as members of the educational team, identifying throughout the statute the parent and school district as the parties with authority to act. These statutory references not only support the fact that a parent is an aggrieved party, they also require parents to embody the role as advocates "for the benefit of another," in this case, their child with a disability.

(24), (25). Congress also mandated that an appropriate education be provided to children with disabilities at "no cost to parents." *Id.* §§ 1401 (9), (29). Congress placed parents in a prominent role in the creation of an Individualized Education Program for each child with a disability. *Id.* § 1414. The IDEA forbids narrowing by rule the rights of parental consent to the specific programs developed. *Id.* § 1406(b). Congress required states to reimburse parents for private school tuition if such placement is the appropriate educational setting under the IDEA. *Id.* § 1414. The statute goes to great lengths to provide an extensive set of procedural safeguards to be exercised by parents in order to protect the substantive rights provided to children in the IDEA. *Id.* § 1415.

The role of parental advocacy is essential to under-resourced parents for whom the IDEA is the only tool available to ensure their children receive FAPE. Congress included parents in every critical point of the statutory scheme. To do otherwise would unnaturally dismantle rights which are inherently married and interdependent. The IDEA's numerous provisions that contemplate and confirm that the rights and responsibilities of parent and child are co-extensive, demonstrate the key partnership of parents in the process of appropriately educating children with disabilities. This includes the critical ability for parents to advocate for their children's rights in court.

II. Prohibiting Parents of Children with Disabilities Who Are Unable to Obtain a Lawyer from Appearing *Pro Se* in Federal Court Denies Parents the Ability to Equally Exercise Their Rights Under the IDEA.

A. Families of children with disabilities are over-represented among poor populations.

That parents may pursue both their procedural and substantive rights under the IDEA is consistent with the reality that poor people are negatively affected by a decision to the contrary. M. Brendhan Flynn, *In Defense of Maroni: Why Parents Should Be Allowed to Proceed Pro Se in IDEA Cases*, 80 Ind. L J. 881, 892 (2005). Many mothers and fathers of children with disabilities are forced to proceed *pro se* because they either have no money or have run out of money to pay for a lawyer. *See, e.g., Devine v. Indian River County Sch. Bd.*, 121 F.3d 576, 578 n.5 (11th Cir. 1997) (per curiam).[3] Often, these parents are also unable to find a lawyer with both the expertise and the willingness to work for free.[4]

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3. The Winkelman family's annual income, for example, is less than $40,000 a year. They have no savings and a monthly mortgage payment of $1,300. *See* Petr.s' Br. Cert. at fn 2. According to Mrs. Winkelman, one lawyer asked for a fee of $2,600 to be paid biweekly in order to represent Jacob in the appeals court below, or a payment every two weeks of twice the amount the family paid every month for their mortgage. Adam Liptak, *Nonlawyer Father Wins His Suit over Education, and the Bar Is Upset*, N.Y. TIMES, May 6, 2006, at A8.

4. COPAA conducted an informal survey of its member attorneys to determine the hourly rate, retainer and total matter cost for handling an IDEA case. These results indicate that attorneys practicing in this area typically charge anywhere from $150 an hour to $450 an hour, depending on experience. The survey results also indicate that the majority of these practitioners require their clients

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The decision below precludes federal court review of IDEA claims for those parents unable to pay for qualified counsel while allowing those who can afford a lawyer to proceed unimpeded.

Approximately seven million school-aged children with disabilities currently are eligible for services under the IDEA. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 531 (2005) ("As of 2003, the Act governed the provision of special education services to nearly 7 million children across the country.") All of them must proceed in court through a representative, next friend or guardian *ad litem*, which typically is their parent. Fed. R. Civ. P. 17(c). Only a fortunate minority have attorney parents who can plead their case in federal court. *See Devine*, 121 F.3d at 581 n.18. For the majority of parents who struggle to ensure their children receive FAPE, "[a]rdor in the face of large attorneys' bills is naturally tempered." Stefan R. Hanson, *Buckhannon, Special Education Disputes, and Attorneys' Fees: Time for a Congressional Response Again*, 2003 BYU Educ. & L. J. 519, 547 (2003).

As stated in Amici's prior brief in support of certiorari, special education disabilities have long been linked to poverty and minority status, making poor families disproportionately affected by the Sixth Circuit's decision. Amicus Br. Cert. at

(Cont'd)
to pay a retainer averaging $3,000, with some requiring retainers as high as $10,000. A review of the survey results and a random sampling of requests for fees filed in federal court in IDEA cases reveal that the total matter cost for practitioners handling IDEA cases may range from $10,000 to greater than $100,000. *See, e.g.*, Compl. filed in *Guiteras v. Central Bucks School Dist., et al.*, Civil Action No: 2:05-cv-01313-TON (March 31, 2005 E.D. Pa); *see also* Order granting attorneys' fees in *Kaseman v. Dist. of Columbia, et al.*, Civil Action No: 1:03-cv-01858, (Aug. 02, 2004 D.D.C.). A declaration of A. Nelson from COPAA on the fee survey is on file with counsel of record.

7-9. Amici put forth striking evidence taken from a Department of Education survey showing that a higher percentage of lower income families have children with disabilities than families in the general population, including a disproportionate representation of certain minorities in special education among elementary and middle school students. *Id.* at 8. In this study (known as Wave 1), thirty-six percent, or over two million, children with disabilities in the year 2000 belonged to families earning less than $25,000 per year, with approximately twenty-four percent living in poverty. *See* Mary Wagner, *The Children We Serve: Demographic Characteristics of Elementary and Middle School Students with Disabilities and Their Households*, *http://www.seels.net/designdocs/*SEELS_ Children_ We_ Serve_ Report.pdf at 28-29, Ex. 3-10. Over two thirds (67.6%) of school aged children with disabilities, or more than 4.5 million children, were members of families with an annual income of less than $50,000. *Id.*

A comparison of Wave 1 and a follow up survey known as Wave 2 demonstrates that the situation did not improve for poor families of children with disabilities over the two years between surveys. *See* Jose Blackorby, et al., *Wave I Wave 2 Overview*, (August 2004), *http://www.seels.net/designdocs/w1w2/*SEELS_ W1W2_complete_report.pdf at 2-6. Although there were slightly fewer children with disabilities (63%) in families earning less than $50,000 a year, the Wave 2 authors concluded, "[t]hese changes are not sufficient to cause a meaningful decline in the percentage of students with disabilities who live in poverty; 21% are living in poverty in Wave 2, a significantly higher rate than among children in the general population (16% US Department of Commerce, 2002)." *Id.* at 2-5. In fact, in the two years between collection of the Wave 1 and Wave 2 information, ". . . eight percent of all households who were in the middle income category [$25,000-$50,000] in Wave 1, are among the ranks of the families in poverty in Wave 2." *Id.* at 2-6.

Ironically, for those families who are eligible for public legal assistance,[5] the Legal Services Corporation estimates that four out of every five who apply for such assistance are turned away because there are not sufficient resources to handle their cases. *See* Paula L. Hannaford-Agor, *Helping the Pro Se Litigant: A Changing Landscape*, 39 Ct. Rev. 8, 8 (2003). Families above the poverty line living on less than $50,000 per year, like the Winkelman family who do not qualify for subsidized legal assistance, "seldom are able to afford help from the private bar." Albert H. Cantril, American Bar Association, *Agenda for Access: The American People and Civil Justice*, (1996), http://www.abanet.org/legalservices/downloads/sclaid/agendaforaccess.pdf.

However valid the grounds are for a federal action, if parents cannot proceed *pro se*, then "such an outcome subverts Congress's original intent [in the precursor statute to the IDEA] . . . that due process procedures, including the right to litigation if that became necessary, be available to all parents." *Maroni*, 346 F.3d at 258, (*citing Handicapped Children's Protection Act of 1986*, S. Rep. No. 99-112, at 2 (1986)). As so aptly stated by then Congressman now Senator Jim Jeffords: "Should the ability to pay for the services of an attorney determine which students have a better chance of receiving appropriate services and placement because they can afford an attorney to represent them at various stages of the administrative appeal and in litigation? I think we would all agree the answer is a resounding 'no'." 132 Cong. Rec. 17610 (1986).

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5. A family of four living in the lower 48 states is entitled to legal assistance only if the families earn $20,750 per annum or less. *See Income Level for Individuals Eligible for Assistance*, 71 Fed. Reg. 5,012 (2006).

B. Basic statutory rights and constitutional principles are ignored disproportionately for poor people if parents are not allowed to appear *pro se* in federal court to pursue FAPE.

As this Court has recognized, education is "perhaps the most important function of state and local governments," *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954), and implicates both a liberty interest and a property interest under the U.S. Constitution. *See Goss v. Lopez*, 419 U.S. 565, 576 (1975). Therefore, education cannot be taken away from a child without some measure of due process. *Id.* At its most basic, this due process right requires notice and an opportunity to be heard. *See Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *Griffin v. Illinois*, 351 U.S. 12, 24 (1956) (noting that a state cannot "bolt the door to equal justice"). The IDEA embodies the liberty and property interests a child has in an education as FAPE. That FAPE cannot be taken away without due process is a principle manifested in the IDEA, where Congress makes clear that a school cannot unilaterally change a child's placement, refuse necessary services, or select a placement that does not provide FAPE without affording the child *and his parents* the right to challenge those decisions. *See* 20 U.S.C.A. §§ 1401, 1414, 1415 (emphasis added).

A critical issue, therefore, is what constitutes an opportunity to be heard. *See, e.g., Goss*, 419 U.S. at 577 ("Once it is determined that due process applies, the question remains what process is due." *citing Morrissey*, 408 U.S. at 481). The touchstone of due process is access. Without access, there is no opportunity to redress the deprivation of education without due process of law. *See M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (parents must be afforded access to the courts regardless of financial resources); *Mayer v. Chicago*, 404 U.S. 189, 193-94 (1971); *Mullane v. Cent. Hanover Bank Trust Co.*, 339 U.S. 306, 314 (1950) (finding that the right

to due process only exists when an individual can choose for himself whether to contest a determination against his interest).

Access to justice does not and cannot mean merely that parents know only where the courthouse doors are located. Rather, they must be permitted to enter, regardless of their financial status, to enable meaningful protection of the right to FAPE guaranteed to their children with disabilities. Conditioning the right to be in federal court on the ability of a parent to either pay for or find a qualified lawyer to act *pro bono* will wholly defeat a child's right to an education.[6]

III. The Substantive/Procedural Right Distinction Developed in Some Circuits Is Contrary to the Plain Language of the Statute, Was Neither Envisaged Nor Intended by Congress and Causes Disastrous Effects to Parents.

A. The IDEA's plain language establishes that parents have both procedural and substantive rights.

As correctly found by both the First Circuit in *Maroni*, and by Judge Roth in her carefully reasoned dissent in *Collinsgru v. Palmyra Board of Education*, 161 F.3d 225, 237-38 (3d Cir. 1998), parents can pursue both procedural

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6. In the words of former Justice Lewis Powell,

> [e]qual justice for all man is one of the great ideals of our society. This is the end for which our entire legal system exists. It is central to that system that justice should not be withheld or denied because of an individual's race, his religion, his beliefs or his station in society. We also accept as fundamental that the law should be the same for the rich and the poor.

See Lewis Powell, *The Response of the Bar*, 51 A.B.A.J. 751 (1965).

and substantive IDEA rights *pro se*. *See Maroni*, 346 F.3d at 250-58. The correctness of this approach is confirmed by this Court's observation that the IDEA's protections are based on "the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much, if not all of what Congress wished in the way of substantive content." *Rowley*, 458 U.S. at 206. This artificial distinction between procedural and substantive rights is thus inimical to the meaning and purpose of the IDEA. *See id.*

Nowhere in the IDEA is there even a suggestion that Congress intended to limit parents to procedural rights for the purposes of judicial review.[7] Even the majority in *Collinsgru* admitted that

> [s]ome of . . . [the IDEA] language can be read to suggest that Congress intended parents and children to share the underlying substantive right—that is, that Congress meant both to give children a substantive right to an appropriate education and to give their parents the substantive right to have their children receive an appropriate education.

161 F.3d at 254. Because parental rights are co-extensive with the rights of their children, it follows that if children possess both, parents possess both. Congress emphasized this interconnectivity when it found that "the education of children with disabilities can be made more effective by . . .

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7. For example, the rules for parental recovery of attorney's fees for IDEA litigation do not differentiate substantive rights from procedural rights but address parental rights as a whole. *See* 20 U.S.C.A. §1415(i)(3)(B) (referring to the prevailing party "who is the parent of a child with a disability" without limiting the grounds on which the parent may prevail).

strengthening the role and responsibility of parents." 20 U.S.C.A. § 1400(c)(5).[8]

B. Congress intended no distinction between substantive and procedural rights as evidenced by the IDEA's failure to make such a distinction for administrative hearings.

It is undisputed that parents possess both procedural and substantive rights of their own at the administrative stage of IDEA proceedings. None of the provisions of the IDEA "regarding the right of parents to seek relief in administrative or judicial hearings draws a distinction between substantive and procedural rights." *Maroni*, 346 F.3d at 254. Parents have been held to be within the definition of a "party aggrieved" for the purposes of administrative appeals from due process hearings. *See id.* at 251-52; *Bd. of Educ. v. Kelly E. ex rel. Nancy E.*, 207 F.3d 931, 935 (7th Cir. 2000). There is no reason why parents' rights should be reduced when they seek to enforce rights in a judicial, rather than in an administrative context.

The term "parties aggrieved," which includes parents for the purposes of administrative appeals, is identical to the definition used in 20 U.S.C.A. § 1415(i), which addresses the parties in the context of judicial review. *See Maroni*, 346 F.3d at 252 ("If parents are 'parties aggrieved' by due process hearings when seeking to appeal to a state administrative agency, then, logically, they are also parties aggrieved by due process hearings when seeking judicial review."); *see also* 20 U.S.C.A. § 1415(i).

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8. Under the IDEA's predecessor statute, the Education for All Handicapped Children Act (EHA), courts have "almost uniformly permitted parents to sue *pro se*" without distinguishing between substantive and procedural rights. *Maroni*, 346 F.3d at 250 (internal citations omitted).

Practically speaking, the administrative appeals and judicial review process and purpose are extremely similar. A party in a due process hearing (including a parent representing himself or herself *pro se*), has the right to present evidence, confront and cross examine witnesses and compel testimony. 20 U.S.C.A. § 1415(h). Moreover, any party seeking review of an administrative decision or due process hearing outcome by a federal court would, by definition, be asking the court to consider the same rights, procedural or substantive, that were at issue in the earlier hearings or administrative appeals. If the parents may "pursue substantive claims . . . at due process hearings, they should be able to pursue substantive claims when they are aggrieved by the outcome of the due process hearings at which they presented these claims." *Maroni*, 346 F.3d at 255.

C. The faulty substantive/procedural distinction some circuits have drawn should be rejected by this Court to assure parents are not penalized for engaging in unauthorized practice of law.

With the exception of the Sixth Circuit, every Circuit that has considered the issue of parental rights in the context of IDEA cases in federal courts has found that parents have at least procedural rights of their own under the IDEA. The federal appellate courts have manifested their current confusion on the issue through their collective failure to define meaningfully the difference between procedural and substantive rights, to apply that difference consistently or to find any principled basis for making such a distinction under the IDEA or based on Congressional intent. *See Mosely v. Bd. of Educ. of the City of Chicago*, 434 F.3d 527 (7th Cir. 2006), *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 297 F.3d 195 (2d Cir. 2002); *Collinsgru*, 161 F.3d at 227; *Devine*, 121 F.3d at 582; *Wenger v. Canastota Cent. Sch. Dist.*, 146 F.3d 123, 125-26 (2d Cir. 1998). The issue is so

convoluted that some courts, in order to avoid an unfair result, disregard the substantive/procedural distinction in practice, while purporting to maintain the distinction in theory. *See, e.g.*, *Mosely*, 434 F.3d at 532; *Murphy*, 297 F.3d at 200.

In reality, procedural and substantive rights cannot be separated. *See Maroni*, 346 F.3d at 255. Such a legal separation is untenable, and, if not corrected, will continue to confuse parents and courts about the scope of rights a parent may seek to vindicate in federal court, a likely motivation for this Court to have accepted certiorari in this case. One outcome of maintaining this artificial distinction is to cause continued prosecution of parents for seeking court redress. At least one bar association chose to exercise its authority over the practice of law to punish parents who attempt to bring an IDEA action *pro se* before a federal court. *See* Petr.s' Supplemental Br. Cert. at 2-3. Prior to this Court accepting certiorari, the Cleveland Bar Association investigated the Winkelmans and stated its intent to file a claim for unauthorized practice of law for filing the notice of appeal before the Sixth Circuit in this case. App. B to Petr.s' Supplemental Br. Cert. at 5A. The same bar association charged another family with unauthorized practice of law for representing their interests as parents under the IDEA in federal complaints. App. A, B, C to Petr.s' Supplemental Br. Cert.

The reality for parents facing a possible misdemeanor charge for pursuing their rights in federal court is that they may choose to abandon their claim if they cannot afford an attorney. This chilling effect was not intended by the IDEA and is further evidence that Congress did not create a substantive/procedural rights distinction.

D. Limiting or preventing parents from proceeding *pro se* will effectively deny access to federal courts in IDEA cases and allow administrative decisions to be final, rather than rendering courts the consistent and final arbiters of IDEA claims.

The procedural rights accorded to aggrieved parties under the IDEA are much greater rights than those granted to aggrieved parties that challenge other types of administrative decisions. Denying IDEA aggrieved parties the right to these critical procedural safeguards directly contravenes Congressional intent and effectively renders an impartial hearing officer (IHO) the final arbiter of an IDEA claim. When courts preclude parents who cannot afford legal counsel from proceeding *pro se* on behalf of their children with disabilities on IDEA claims, the checks and balances statutorily established by Congress to ensure that children have the opportunity to judicially enforce their IDEA rights likely will not exist for poor children and children unable, through their parents, to find a *pro bono* lawyer. Such a result unfairly precludes not only meaningful challenges by parents to flawed IHO rulings, but it also unfairly precludes the parent who has prevailed before the IHO from defending the ruling if the school district files a court action. If parents are not permitted to defend their hard-won administrative decision by proceeding *pro se*, then the school district could simply file a federal action and await a default in their favor.

IDEA's language expresses a clear Congressional intent that courts, rather than IHO's, give the final word in IDEA cases. Indeed, it is a vital "procedural safeguard," as reflected by the title of 20 U.S.C.A. § 1415, which statutorily and unequivocally confers upon an aggrieved party the right to bring a civil action in federal court. *See* 20 U.S.C.A. § 1415(i)(2)(A) (entitled "Procedural safeguards" and providing that "any party aggrieved by the findings and

decision" of the administrative proceedings may file a civil action in the federal district court or in any state court of competent jurisdiction). "In explicitly providing in § 1415(e)(2) that any aggrieved party has a right to bring a civil action . . . Congress clearly contemplated more than the customary appeal from an administrative decision." *Tokarcik v. Forest Hills Sch. Dist.*, 665 F.2d 443, 450 (3d Cir. 1981), *cert. denied sub nom*, *Scanlon v. Tokarcik*, 458 U.S. 1121 (1982).

Bringing an action in court under the IDEA is a more significant procedural safeguard than are appeals from other administrative actions. "Decision on the record compiled before the administrative agency is the norm in judicial review of administrative action." *Hunger v. Leininger*, 15 F.3d 664, 670 (7th Cir. 1994). In contrast, a court in an IDEA action is instructed that it is not only to "receive the records of the administrative proceedings," but also "shall hear additional evidence at the request of a party, and basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C.A. § 1415(i)(2).

The Ninth Circuit has observed that "judicial review in IDEA cases differs substantially from judicial review of other agency actions, in which courts generally are confined to the administrative record and are held to a highly deferential standard of review." *Susan N. v. Wilson Sch. Dist.*, 70 F.3d 751, 757 (3d Cir. 1995) (*quoting Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1471 (9th Cir. 1993), *cert. denied*, 513 U.S. 825 (1994)). Because the IDEA specifically requires a district court to review the administrative record and hear additional evidence, and grant appropriate relief based on the preponderance of the evidence, a district court "does not use the substantial evidence standard typically applied in the review of administrative agency decisions, 'but instead must decide independently whether the requirements of the IDEA

are met.'" *Murray v. Montrose County Sch. Dist.*, 51 F.3d 921, 927 (10th Cir. 1995) (*quoting Bd. of Educ. v. Illinois State Bd.*, 41 F.3d 1162, 1167 (7th Cir. 1994)); *see also Valerie J. v. Derry Coop. Sch. Dist.*, 771 F. Supp. 483, 488, *order clarified*, 771 F. Supp. 492 (D.N.H. 1991) (finding that although the district court sits in most respects as an appellate court, "its duty is to evaluate all evidence independently and not to merely affirm or reverse" the decision of the appeals panel).

This Court noted the Congressional intent underlying the IDEA was for courts, not the administrative officers, to make final decisions:

> . . . Congress expressly rejected provisions that would have so severely restricted the role of reviewing courts. In substituting the current language of the statute for language that would have made state administrative findings conclusive if supported by substantial evidence, the Conference Committee explained that courts were to make "independent [decisions] based on a preponderance of the evidence."

Rowley, 458 U.S. at 205 (*citing* S. Conf. Rep. No. 94-455 at 50 (1975). *See also* 121 Cong. Rec. 37416 (1975) (remarks of Sen. Williams)). Inherent in Congress's decision to allow courts to consider additional evidence and make independent decisions is an attempt to ameliorate the concerns that an administrative proceeding may not receive all the information it needs to adjudicate rights under the IDEA and that the rights adjudicated under the IDEA are so important that they deserve more thorough scrutiny by an impartial judicial body.

CONCLUSION

For the reasons set forth above this Court should reverse the decision of the Sixth Circuit.

Respectfully submitted,

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